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LEE KWAN WOH

v.

PP

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COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
RAUS SHARIF JCA
HELILIAH MOHD YUSOF JCA
[CRIMINAL APPEAL NO: A-05-49-2002]

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21 APRIL 2008

CRIMINAL LAW: *Dangerous Drugs Act 1957 - Section 39B - Trafficking in 420 grams of cannabis - Appeal against conviction and death sentence - Whether prosecution made out a prima facie case -*

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Whether defence proved on a balance of probabilities - Whether good reasons to reverse findings of fact by learned judge – Whether presumption under s. 37(da)(iv) rebutted

The accused was convicted and sentenced to death on a charge under s. 39B of the Dangerous Drugs Act 1952 ('the Act') of trafficking in 420 grams of cannabis. The accused appealed against his conviction and sentence.

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Held (dismissing the appeal)
Per Raus Sharif JCA delivering the judgment of the court:

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(1) The learned judge adequately evaluated the prosecution's evidence and drew the irresistible inference from the evidence adduced that the prosecution had made out a *prima facie* case of trafficking. The accused was in custody and control of the

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cannabis and he had knowledge of it. In law, the accused was in possession of the cannabis. Since the weight of the cannabis was 420 grams, it raised a presumption under s. 37 (da)(iv) of the Act that the accused was trafficking in the said drugs. The learned judge was therefore right to call the

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accused to enter his defence on the charge of trafficking. (para 16)

(2) The learned judge's finding that the accused had knowledge of the cannabis was not solely on the inference that the

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accused had tried to escape when confronted by the police. It was also based on the factual background of the arrest of the accused. (para 20)

(3) Once the defence was called the burden of proof shifted to the accused to prove on the balance of probabilities that he was not trafficking in the said cannabis. The learned judge rejected the denial by the accused of possession of the cannabis and instead accepted the version of the prosecution witnesses. He found them to be credible and believable. Those were findings of fact and there were no good reasons to reverse such findings of fact. Therefore, the presumption under s. 37(da) (iv) of the Act was not rebutted. The evidence on record and grounds of judgment showed beyond reasonable doubt that the conviction of the accused was safe. (paras 22 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh telah disabit dan dihukum mati atas kesalahan di bawah s. 39B Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 420 gram cannabis. Tertuduh merayu terhadap sabitan dan hukuman yang dikenakan.

Diputuskan (menolak rayuan)
Oleh Raus Sharif HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim telah menimbang keterangan pihak pendakwaan dengan secukupnya dan telah membuat inferens tak dapat disangkal dari keterangan ada bahawa pendakwaan telah membuktikan suatu kes *prima facie* pengedaran. Tertuduh mempunyai jagaan dan kawalan cannabis dan mempunyai pengetahuan tentangnya. Maka di sisi undang-undang, tertuduh mempunyai milikan cannabis. Dan oleh kerana berat cannabis adalah 420 gram, ia membangkitkan anggapan di bawah s. 37(da)(iv) Akta bahawa tertuduh telah mengedar dadah tersebut. Yang arif hakim dengan itu betul bilamana memanggil tertuduh untuk membela diri atas pertuduhan mengedar.

(2) Dapatan yang arif hakim bahawa tertuduh mempunyai pengetahuan mengenai cannabis bukan semata-mata berasaskan inferens bahawa tertuduh cuba melarikan diri apabila berhadapan dengan polis. Ia juga diasaskan kepada latarbelakang faktual penangkapan tertuduh.

A **(3)** Sebaik pembelaan dipanggil, beban pembuktian beralih kepada tertuduh untuk membuktikan atas imbangan kebarangkalian bahawa beliau tidak mengedar cannabis tersebut. Yang arif hakim menolak penyangkalan yang dibuat oleh tertuduh dan sebaliknya menerima versi saksi-saksi pendakwaan. Beliau
B mendapati mereka sebagai menyakinkan dan boleh dipercayai. Ini adalah dapatan fakta dan tiada alasan kukuh untuk mengakasnya. Oleh itu, anggapan di bawah s. 37(da)(iv) Akta telah tidak disangkal. Keterangan pada rekod serta alasan-alasan penghakiman menunjukkan di luar keraguan munasabah
C bahawa sabitan tertuduh adalah selamat.

Case(s) referred to:
Abdullah Zawawi v. PP [1993] 4 CLJ 1 SC ***(refd)***
Chan Pean Leong v. PP [1956] 1 LNS 17 HC ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
D *PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC* ***(refd)***
PP v. Ouseng Sama-Ae [2008] 1 CLJ 337 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(da)(iv), (vi), 39B

E *For the accused - Dato' K Kumarandran (M M Athimula with him); M/s Kumar & Co*
For the prosecution - Samsudin Hassan AG's Chambers

[Appeal from High Court, Ipoh; Criminal Trial No: 45-17-2001]

F *Reported by Usha Thiagarajah*

JUDGMENT

G **Raus Sharif JCA:**

[1] The accused was charged under s. 39B of the Dangerous Drugs Act 1952 ("the Act") for trafficking of 420 grams of cannabis. The charge reads:

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> Bahawa kamu pada 4 April 2000, lebih kurang jam 4.00 petang di Jalan Selasar 10, Taman Ipoh Jaya, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, bagi pihak kamu sendiri telah memperedarkan dadah berbahaya, iaitu cannabis seberat 420 grams. Oleh yang demikian kamu telah melakukan satu kesalahan
I di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] On 18 September 2002, the accused was convicted and sentenced to death by the High Court at Ipoh, Perak. He appealed to this court against the conviction and sentence. We heard this appeal on 7 January 2008 and unanimously dismissed it.

[3] Briefly, the case for the prosecution is as follows. On 4 April 2000, the accused and his family had gone to the gravesites of their relatives at Jalan Tambun, Ipoh and then at Tanjong Tualang. It was a Cheng Beng day, a day in the Chinese calendar when the Chinese would visit gravesites to offer prayers and respect to their deceased ancestors. The accused and his family went to the gravesites in two separate cars. The accused drove his brother's (SP5) car, a Proton Saga bearing the plate number of ABA 6363 ("Proton Saga").

[4] They returned home after the visits. The accused and SP5 immediately cleaned the Proton Saga and emptied it of all paraphernalia that the family had brought to the gravesites. After cleaning the Proton Saga the accused asked SP5's permission to use the Proton Saga to go out to meet up with some friends. SP5 told the accused that he would tag along as he wanted to go to his work place. The accused then drove the Proton Saga with SP5 as the passenger. He dropped off SP5 at a shop house called Fook Loong. The accused then drove towards Taman Ipoh Jaya.

[5] Later, the accused was sighted by a police party waiting in ambush at Jalan Selasar Rokam 10. The police party had earlier gathered at the scene following information received by Inspector Hilimi bin Ahmad (SP4) of drug trafficking activity by a Chinese in a Proton Saga ABA 6363 in the vicinity of Taman Ipoh Jaya, Gunung Rapat, Ipoh.

[6] SP4, himself led the police party which comprised of D LKpl Magendran a/l S Sagaran (SP8), D LKpl Abdul Shukor bin Sarjuni and D LKpl Zulkifli bin Ali. They were in a car driven by D LKpl Zulkifli bin Ali. The accused was sighted by the police party at about 4.05pm. He had then parked the Proton Saga along the main road adjacent to a house No. 52, Jalan Selasar Rokam 10. D LKpl Zulkifli bin Ali moved up and parked his car alongside the Proton Saga. SP4 and SP8 simultaneously came out of the car and stopped the accused who had then alighted from the Proton Saga.

[7] The accused was carrying a white plastic bag (P13). SP4 introduced himself to the accused as 'Polis'. The accused tried to escape but was apprehended after a scuffle. He was pinned to the ground. In the struggle, the accused suffered minor cuts to his left arm and back. SP4 had then snatched the plastic bag from the accused hand and in the process tore the handle.

[8] SP4 inspected the plastic bag. It contained a slap of greenish-brown leafy substance suspected to be cannabis wrapped in Chinese newspaper. The slap of greenish-brown leafy substance was subsequently analysed by the chemist (SP6) who confirmed it to be cannabis, ie, a dangerous drug as defined under s. 2 of the Act with a net weight of 420 grams.

[9] At the end of the prosecution's case, the learned trial judge called upon the accused to enter on his defence. In the ground of judgment, he stated as follows:

> This court took the view that the accused had been found to be in possession of the drugs weighing more than the minimum statutory requirement for the offence of trafficking and had called him to enter into his defence without the need for the prosecution to submit that it had established a *prima facie* case. I was also satisfied that the prosecution had adduced incontrovertible evidence to prove beyond reasonable doubt that the drugs in the accused's possession was that of cannabis, a scheduled dangerous drug as defined under s. 2 of the DDA. The weight of the drugs was 420 grams as found by the chemist (SP6) … .

[10] The accused elected to give evidence on oath. He was the only witness for the defence. The accused testified that on 4 April 2000 after dropping off SP5, he drove the Proton Saga to go to his friend's house at Taman Ipoh Jaya. It took him two to three minutes to get from the place he dropped off SP5 to his friend's house where he was arrested. According to him, he was arrested inside the compound of his friend's (one named Hak Kwai) house and not outside by the roadside as stated by the prosecution's witnesses. According to him, he parked the Proton Saga in front of his friend's house. There he saw the front gate and the main door of the house opened. He walked towards the house and called for his friend. Suddenly a few people rushed out of the house and one of them used a large towel to cover his head and there occurred a scuffle. When he was overpowered he found that the people were the police. The police then asked him where the cannabis was. He replied that he does not know and told the

police that he came there merely to ask his friend out for a drink. He was then struck and kicked by the police and later brought to the police station. At the police station, the police showed him a plastic bag and asked him to admit possession of cannabis inside it. He refused and was again hit by the police. He was subsequently sent to the hospital by the investigating officer (SP3) for treatment.

[11] The accused further testified that at the police station he met his friend Hak Kwai, who was also arrested. Hak Kwai told him that the drugs was recovered from his house. In his evidence, the accused did explain the scuffle with the police. According to him, he was jumped upon suddenly by a group of people and had thought that there was a robbery when a towel was used to cover his head. He did not know the people who jumped upon him were the police.

[12] At the conclusion of the trial, the learned trial judge rejected the accused denial of possession of the cannabis, and instead, accepted the version of evidence as narrated by the prosecution's witnesses. He found that the accused had failed to rebut the presumption under s. 37(da)(vi) of the Act that he was trafficking in the said 420 grams of cannabis.

[13] Before us, learned counsel for the accused submitted that the learned trial judge was wrong to call the accused to enter his defence on the charge of trafficking. According to the learned counsel, the prosecution had failed to establish the ingredients of the offence of trafficking at the close of its case. At best, the prosecution had only made up a *prima facie* case on possession but not trafficking.

[14] With respect, we disagree. In this case the prosecution was relying on the presumption under s. 37(da)(iv) of the Act which reads:

> (da) any person who is found in possession of:
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> (iv) 200 grams or more in weight of cannabis … shall be presumed, until the contrary is proved, be trafficking in the said drug.

Hence, in order to establish a *prima facie* case against the accused, the prosecution had to prove: (i) that the accused was in actual possession of the cannabis; and (ii) that the accused at the material time had knowledge of the cannabis found in his

possession. (See *Chan Pean Leong v. PP* [1956] 1 LNS 17; *PP v. Badrulsham Baharom* [1987] 1 LNS 72 and *Pendakwa Raya v. Ouseng Sama-Ae* [2008] 1 CLJ 337).

[15] In this case, the first ingredient was clearly established because the accused did have custody and control of the plastic bag (P13). The learned trial judge accepted the evidence as narrated by the prosecution's witnesses, in particular SP4 and SP8 that the accused was carrying P13, containing the cannabis, when he was arrested. The accused was exercising dominion over P13 at all material time. The next question is whether he had knowledge of the cannabis that he was carrying. The learned trial judge found the accused had the knowledge. He reasoned as follows:

> The plastic bag is an ordinary shopping bag with an open end, at the handle. The cannabis slab which was loosely wrapped in Chinese newspaper was the only content of that plastic bag which brought an inference that he knew its existence in P13. When confronted by the police the accused had tried to make a break and had to be apprehended with some degree of force by SP4 and SP8. In the scuffle the accused was pinned down to the ground and suffered cuts to his back and left arm. The plastic bag was snatched from his hand and this force had broken its handle. This fact only lead to one conclusion in *(sic)* the accused knew the contents of the plastic bag that he held.

[16] It is our respectful view, the learned trial judge did adequately evaluate the prosecution's evidence and draw the irresistible inference from the evidence adduced in this case that the prosecution had made out a *prima facie* case of trafficking. The accused was in custody and control of the cannabis and he had the knowledge of it. In law, the accused was in possession of the cannabis. Since the net weight of the cannabis was 420 grams, it raised a presumption under s. 37(da)(iv) of the Act that the accused was trafficking in the said drugs. The learned trial judge was therefore right to call the accused to enter upon his defence on the charge of trafficking.

[17] Another complaint raised by learned counsel for the accused was that the learned trial judge had failed to consider adequately the issues raised by the defence. Again, with respect we disagree. After a careful perusal of the appeal record and the learned trial judge's grounds of judgment, we cannot see any merit in the complaint. The learned trial judge had in fact dealt with all the

issues raised by the defence. This is how the learned trial judge dealt on the issue of failure of the police to discover any fingerprint on the plastic bag the accused was carrying:

> As regards the failure by the police to discover any fingerprint on the plastic bag, I find this to be of no consequential *(sic)* to the prosecution case. The plastic bag (P13) was recovered from the physical possession of the accused himself. There is my view no further necessity for the prosecution to prove this physical possession by proof that the accused's fingerprints were found on it, although such an evidence would certainly be of great positive corroborative value to the testimonies of the police who made the seizure of P13 from the accused's hand. The evidence of SP3, the investigating officer shows that attempts were made to recover fingerprints on that exhibit through the fingerprint expert but to no avail. I am satisfied that this failure had not caused any reasonable doubt on the prosecution's case as the accused's physical possession in the plastic bag.

[18] And this was how the learned trial judge directed himself with regard with the colour of cannabis described differently as "choklat dan hijau" by SP4, "hijau" by SP8 and brown by SP6:

> ... I am also satisfied beyond any reasonable doubt that the arresting officer, the investigating officer and the chemist had through their respective testimonies that all reasonable care had been taken in the handling of the exhibits especially that of SP13 and the drugs recovered therein. There had been no incidence of a mix-up or any possibility of such mix-up. I had found as a fact they had respectively taken all the necessary steps and care to ensure that the cannabis, now the subject matter of the charge, is and was the same cannabis slap that was initially recovered from the possession of the accused. As for the different version given in the colour of the cannabis I am of the view that this does not cast any reasonable doubt on the prosecution's case. The colour description given by these witnesses is a question of one's perception of a true colour. It is expected that different colour descriptions be given by different witnesses since the cannabis, which is a greenish-brown leafy substance cannot be said of one definite colour description.

[19] It was also submitted that the accused's explanation to the scuffle with the police was not considered by the learned trial judge. As stated earlier, the accused explanation was that he was jumped upon by a group of people and had thought there was a robbery when a towel was used to cover his head. He resisted because he did not know the people were the police. This,

A according to learned counsel, has raised two inferences and where there are two inferences available the inference most favourabe to the accused must be drawn. (*Abdullah Zawawi v. PP* [1993] 4 CLJ 1 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

B **[20]** It is our respectful view that the learned trial judge finding on the accused's knowledge of the cannabis was not solely on the inference that the accused had tried to escape when confronted by the police. It was also based on the factual background of his arrest. This how the learned trial judge addressed the issue:

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> As regards the accused's knowledge, this can only be inferred from the factual background of his arrest. As stated by Lim Beng Choo, J in *PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585:
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> > Putting it shortly, in order to arrive at a finding of
> D knowledge the court will have to consider the totality of evidence, including any explanation or denial made by the accused on his conduct on the occasion in question.
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> And as stated in *Chan Pean Leong v. PP* [1956] MLJ 237 referred to the learned judge in *Badrulsham*:
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> > Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances.
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> As said earlier, the plastic bag held by the accused upon his arrest,
> F was an open one and the cannabis was its only content. This situation brings to mind the remarks made by Thomson J in *Tong Peng Hong v. PP* [1995] 21 MLJ at p. 233:
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> > If something is found for example in a bag which I am carrying or in a box to which I hold the key it is extremely
> G reasonable to suppose, unless I can produce some satisfactory evidence to the contrary, that I know all about it ...
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> This fact taken together with the conduct of the accused of trying to escape when confronted by the police can only bring this court
> H to one logical and inescapable inference that the accused knew that what he was carrying in the plastic bag was something forbidden by law, in this case cannabis.

[21] In addition to the above, the learned trial judge in this case
I had rejected the story presented by the accused in his defence. He stated the position of the case as follows:

> In the end, this court was left to evaluate the two contradicting reasons produced by the prosecution and the defence. At the outset, it must be said that I had rejected the accused's denial possession of the cannabis to be a baseless defence, one which is not believable and a further story that had not cast any reasonable doubt much less in view of the shifting of the burden of proof under s. 37(da) of the DDA 1952, rebutted probabilities. I also accept the version of the evidence as narrated by the prosecution's witnesses especially that of SP4 and SP8 to be credible and believable. I found them to be witnesses of truth and found no reason to doubt their version of the story. There was also no evidence that the accused had been framed up.

[22] Clearly in this case, once the defence was called, the burden of proof therefore shifted to the accused to prove on the balance of probabilities that he was not trafficking in the said cannabis. The learned trial judge, however rejected the accused's denial of possession of the cannabis and instead accepted the version of the evidence as narrated by the prosecution's witnesses. He found the evidence of SP4 and SP8 to be credible and believable. To us, these are findings of fact. It is most unusual for an appellate court to reverse such findings of facts unless good reasons are shown to us. We see none. Therefore, it is our finding that the presumption under s. 37(da)(iv) of the Act stands unrebutted.

[23] In conclusion, having carefully scrutinised the evidence on record and carefully examined the grounds of judgment, we are satisfied beyond reasonable doubt that the conviction of the accused is safe. The appeal is dismissed. The conviction entered against and the sentence passed upon the accused is affirmed.